

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AHMED AMARIR,)	
)	
Plaintiff,)	No. C 04-5290 CRB (PR)
)	
vs.)	ORDER DENYING MOTION
)	TO VACATE JUDGMENT
JAMES C. HILL, et al.,)	
)	(Doc # 61)
Defendants.)	

Plaintiff moves for an order vacating summary judgment in favor of defendants and reopening his civil rights action pursuant to Federal Rule of Civil Procedure 60(b). For the reasons set forth below, the motion will be denied.

BACKGROUND

Plaintiff, a prisoner at the Correctional Training Facility ("CTF") in Soledad, California, filed a pro se action under 42 U.S.C. § 1983 and 28 U.S.C. § 1367 alleging denial of adequate dental treatment.

Per order filed March 21, 2005, the court found that plaintiff's allegations, liberally construed, stated a cognizable claim for relief for deliberate indifference under § 1983 and for medical malpractice under California law against CTF dentist James C. Hill and CTF chief medical officer Michael L. Friedman. The court dismissed the other named defendants under the authority of 28 U.S.C. § 1915A(b).

1 On September 7, 2005, defendants moved for summary judgment on the
2 ground that there were no material facts in dispute and that they were entitled to
3 judgment as a matter of law. Plaintiff filed an opposition and defendants filed a
4 reply. On June 2, 2006, the court granted summary judgment in favor of
5 defendants and dismissed the medical malpractice claim without prejudice. On
6 October 31, 2007, the Ninth Circuit affirmed.

7 On July 15, 2008, plaintiff filed a motion for relief from the judgment
8 under Federal Rule of Civil Procedure 60(b). Defendants filed an informal
9 response to the motion on August 6, 2008.

10 **DISCUSSION**

11 Plaintiff moves to vacate judgment on two grounds. First, he argues that
12 the judgment should be set aside because he was prejudiced by his appellate
13 attorney's failure to file a timely motion for an extension of time to file a petition
14 for rehearing in the Ninth Circuit. Second, he argues that the judgment should
15 be set aside on the basis of newly discovered evidence.

16 Rule 60(b) provides for relief from judgment where one or more of the
17 following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2)
18 newly discovered evidence which by due diligence could not have been
19 discovered before the court's decision; (3) fraud by the adverse party; (4) the
20 judgment is void; (5) the judgment has been satisfied; (6) any other reason
21 justifying relief. Fed. R. Civ. P. 60(b); *Sch. Dist. 1J v. ACandS Inc.*, 5 F.3d 1255,
22 1263 (9th Cir. 1993). Here, plaintiff specifically cites subdivisions (1), (2) and
23 (6) in support of his motion.

24 Rule 60(b)(1) permits relief from judgment because of "mistake,
25 inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). The
26 moving party must justify his actions and show that his mistake, inadvertence,
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1 surprise or excusable neglect was unexpected and unavoidable rather than
2 careless. *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987).
3 Reconsideration is not allowed pursuant to Rule 60(b)(1) based on an attorney's
4 innocent, careless, or negligent mistakes, or even based on an attorney's
5 intentional misconduct. *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097,
6 1101 (9th Cir. 2006). As a general rule, parties are bound by the actions of their
7 lawyers; even attorney malpractice does not usually provide a basis to set aside a
8 judgment pursuant to Rule 60(b)(1). *Casey v. Alberston's, Inc.*, 362 F.3d 1254,
9 1260 (9th Cir. 2004).

10 Rule 60(b)(2) permits relief from judgment based on "newly discovered
11 evidence that, with reasonable diligence, could not have been discovered in time
12 to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). "[T]he
13 movant must show that the evidence (1) existed at the time of the trial, (2) could
14 not have been discovered through due diligence, and (3) was 'of such magnitude
15 that production of it earlier would have been likely to change the disposition of
16 the case.'" *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (quoting
17 *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir.
18 1987)).

19 Rule 60(b)(6) is a "catchall provision" that applies only when the reason
20 for granting relief is not covered by any of the other reasons set forth in Rule 60.
21 *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005). "It has been
22 used sparingly as an equitable remedy to prevent manifest injustice and is to be
23 utilized only where extraordinary circumstances prevented a party from taking
24 timely action to prevent or correct an erroneous judgment." *Id.* (internal
25 quotations omitted). A party "must demonstrate both injury and circumstances
26 beyond his control that prevented him from proceeding with the prosecution or
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1 defense of the action in a proper fashion." *Id.* (internal quotations omitted).

2 **I. Timing**

3 Defendants argue that plaintiff's Rule 60(b) claims are untimely. Rule
4 60(c) states that "a motion under Rule 60(b) must be made within a reasonable
5 time – and for reasons (1), (2), and (3) no more than a year after the entry of the
6 judgment or order or the date of the proceeding." Judgment was entered in this
7 matter on June 2, 2006, more than two years before plaintiff filed his Rule 60(b)
8 motion; plaintiff's claims under Rule 60(b)(1) and (2) are clearly untimely.
9 Additionally, two years is beyond a reasonable time for plaintiff to bring a
10 "catch-all" claim under Rule 60(b)(6).

11 In any event, the claims are without merit.

12 **II. Attorney Misconduct**

13 Plaintiff argues that he is entitled to relief from judgment under Rule 60(b)
14 because he was prejudiced by his court-appointed appellate attorney's failure to
15 file a motion for an extension of time to file a petition for rehearing in the Ninth
16 Circuit.

17 The relevant sequence of events is as follows. On June 2, 2006, the court
18 granted defendants' motion for summary judgment. On October 31, 2007, the
19 Ninth Circuit affirmed the judgment. On November 11, 2007, plaintiff requested
20 an extension of time to file a petition for rehearing. Mot. Ex. B. The Ninth
21 Circuit responded in a letter dated November 16, 2007 that because plaintiff was
22 represented by counsel, all motions for relief had to be filed by counsel. *Id.* On
23 November 20, 2007, plaintiff's court-appointed counsel informed plaintiff that
24 she had determined not to seek a rehearing and would withdraw as counsel in
25 order to allow plaintiff to proceed pro se. *Id.* Counsel also informed plaintiff
26 that she would request the Ninth Circuit to grant him an extension of time to file
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1 a petition for rehearing. *Id.* On January 29, 2008, counsel filed a joint motion for
2 withdrawal as counsel and for an extension of time to file a petition for rehearing.
3 Mot. Ex. D. On February 1, 2008, the Ninth Circuit granted the motion for
4 withdrawal of counsel but denied the motion for extension of time as moot. *See*
5 Mot. Ex. C.

6 On April 23, 2008, plaintiff filed a petition for a writ of certiorari with the
7 United States Supreme Court. *See id.* In a letter dated April 29, 2008, the Court
8 rejected the petition on the ground that it was "out-of-time." *Id.* The letter
9 explained: "The date of the lower court judgment or order denying a timely
10 petition for rehearing was October 31, 2007. Therefore, the petition was due on
11 or before January 29, 2008. Rules 13.1, 29.2 and 30.1." *Id.* Plaintiff points to
12 the fact that counsel filed the motion for an extension of time with the Ninth
13 Circuit on the same day that his petition for certiorari to the Supreme Court was
14 due and claims that this "untimely" filing entitles him to relief from judgment
15 under Rule 60(b).

16 Plaintiff's claim is without merit. Plaintiff essentially asks the court to
17 vacate summary judgment because his appellate attorney improperly handled the
18 request for rehearing of the Ninth Circuit's affirmance of this court's judgment.
19 Rule 60(b) does not give this court that authority. If plaintiff wishes to reopen
20 appellate review, a motion for reconsideration in the Ninth Circuit is the proper
21 means to do so, not a motion to vacate judgment here.

22 Even if Rule 60(b) did give the court authority to reopen appellate review,
23 attorney negligence is not a valid basis on which to set aside judgment under
24 Rule 60(b)(1). *See Latshaw*, 452 F.3d at 1101. Counsel's delay in filing a motion
25 for an extension of time to file a petition for rehearing cannot justify the court's
26 vacating its grant of summary judgment.

II. Newly Discovered Evidence

Plaintiff argues that he is entitled to relief from judgment on the basis of newly discovered evidence. The evidence on which he relies includes an August 31, 2006 Notice of Settlement of Class Action in the matter *Perez v. Tilton*, an August 2006 California Department of Corrections and Rehabilitation report on the prison healthcare delivery system, and a July 23, 2007 Order Granting Plaintiffs' Motion to Convene Three-Judge Court in the matter *Plata v. Schwarzenegger*. Mot. Ex. D, E, F. Each of these documents discusses systemic problems with the healthcare system in California prisons. The first discusses prisoner dental care in particular and notes that "[a] federal judge has approved a settlement in the civil rights lawsuit about dental care in all California prisons. All California state prisoners with serious dental conditions are members of the plaintiff class in this lawsuit. . . . The settlement requires the California Department of Corrections and Rehabilitation (CDCR) to make major improvements to prisoner dental care." Mot. Ex. D.

Although the materials plaintiff has submitted as "newly discovered evidence" indeed indicate that there are system-wide problems with the healthcare system in California prisons, they are insufficient to create a triable issue of fact on plaintiff's claim of deliberate indifference by individual defendants. That prison healthcare generally has been found constitutionally deficient does not mean that the defendants here treated plaintiff with deliberate indifference. The facts submitted on summary judgment indicate quite the opposite; namely, that defendants consistently examined plaintiff and treated his dental problems during his incarceration at CTF. If plaintiff wanted to allege system-wide problems with the prison healthcare system, the place to do so was on summary judgment, not in a motion for reconsideration.

1 In addition, the evidence plaintiff has submitted as "newly discovered" is
2 not. Each document is dated before the Ninth Circuit's affirmance of this court's
3 entry of summary judgment in favor of the defendants. Plaintiff has failed to
4 show why with due diligence he could not have discovered and presented the
5 evidence on appeal. *See* Fed. R. Civ. P. 60(b)(2); *Jones*, 921 F.2d at 878.

6 CONCLUSION

7 For the foregoing reasons, petitioner's motion to vacate judgment under
8 Rule 60(b) (doc # 61) is DENIED. The motion is untimely and without merit.
9 SO ORDERED.

10 DATED: Sept. 9, 2008

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13 CHARLES R. BREYER
14 United States District Judge
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